CITATIONS

Cases: Page

United States v. John Catto, Jr., and Roxana Catto, 344 F.2d 227 2

United States v. W. H. Wardlaw, Jr. et al., 344 F.2d 225 2

Thompson-King-Tate, Inc. v. U.S., 296 F.2d 290 2

Ross v. Commissioner, 169 F.2d 483 2

Miscellaneous:

Treasury Regulation 1.471-6 1

Treasury Regulation 1.471-6(f) 2,3

Merten's, *The Law of Federal Income Taxation* Section 60.19 2

Maguire & Zimet, *Hobson's Choice and Similar Practices in Federal Taxation*, 14 Harv.L.Rev. 1281 3

T.D. 5423, 1945 Cum.Bull.70. 3

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 535

UNITED STATES OF AMERICA, PETITIONER

vs.

W. H. WARDLAW, INDEPENDENT EXECUTOR OF THE ESTATE OF C. W. WARDLAW, DECEASED, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR REHEARING

Now comes the petitioner, W. H. Wardlaw, Independent Executor of the Estate of C. W. Wardlaw, Deceased, by his counsel, and respectfully prays for a rehearing of this case.

This petition is brought because the Opinion of the Court contains an erroneous statement of material fact, vital to the decision rendered. At page 3, the Opinion states that "Each of the respondents *elected*" to use the "unit-livestock-price" method of valuing his inventories;[1] where-

[1]At page 3, the Opinion states: "Each of the respondents elected the 'unit-livestock-price' variant of the accrual method of accounting for his overall ranching operation.5" Footnote 5 of the Opinion cites Treas. Reg.1.471-6 as the authority for this method; the method was **first prescribed** for livestock raisers by the 1944 predecessor of Reg.1.471-6, namely, Reg.111, Sec.29.22(c)-6.

as the uncontroverted fact is that the respondents in the *Wardlaw* case, as distinguished from the respondents in the *Catto* case,[2] did *not* so elect, but were *compelled* to use that method when it was first prescribed by the Commissioner's Regulations in 1944.

The decision of the Court apparently turns on the respondents having made an election under Reg. 1.471-6(f), the Opinion tracing the history, describing the operation, and expressly upholding the validity, of Reg. 1.471-6(f), which provides that a "taxpayer who *elects* to use the unit-livestock-price method" of valuing his inventories "must apply it to all livestock raised", including his breeding animals, thereby treating his breeding animals as inventory items even though they are, by statutory definition, "property used in the trade or business." The Opinion concludes that Reg. 1.471-6(f) is "neither arbitrary nor inconsistent with the revenue statute or with other regulations under the statute." The Court's position appears to be that having *elected* the *advantages* of the method of inventory valuation prescribed by Reg. 1.471-6(f) the taxpayers are bound by their election and must assume whatever *burdens* the election may entail.

In discussing the doctrine of election, Merten's, *The Law of Federal Income Taxation*, Section 60.19, p. 74, states that *"The doctrine of election implies that a taxpayer is given the option of freely taking two courses of action; where there is no freedom of choice and the election is by compulsion, the rule is inapplicable."* Cited authority includes *Thompson-King-Tate, Inc. v. U.S.*, 296 F.2d 290 (CCA 6th, 1961), and *Ross v. Commissioner*, 169 F.2d 483 (CCA 1st, 1948). To similar effect, see definition of election in

---

[2] **United States v. John Catto, Jr. and Roxana Catto**, 344 F.2d 227, and **United States v. W. H. Wardlaw, Independent Executor of the Estate of C. W. Wardlaw, Deceased, et al.**, 344 F.2d 225, are the two separate and distinct Court of Appeals cases covered by the Opinion of this Court in **United States, Petitioner, v. John Catto, Jr. et al.** The Government saw fit to join these two cases for purposes of seeking review by this Court.

Maguire & Zimet, *Hobson's Choice and Similar Practices in Federal Taxation*, 48 Harv.L. Rev. 1281, at p.1285.

It is no doubt true that the taxpayers in the *Catto* case *did* elect to use the unit-livestock-price method, for the obvious reason that they began business after the method was first prescribed by the Regulations in 1944 and therefore were in a position to select or reject the method; it is equally true, however, that the taxpayers in the *Wardlaw* case *did not* elect to use the unit-livestock-price method, for the reason that they began business *before* the method was first prescribed by the Regulations in 1944, and in 1944 *they were not offered any election at all*, but, on the contrary, were *compelled to use* the unit-livestock-price method because of an express provision of the Regulations adopted in 1944, which read as follows:

> "A livestock raiser who has, for taxable years beginning prior to January 1, 1944, adopted a constant unit price method of valuing livestock inventories and filed returns on that basis *will be considered as having elected* the 'unit-livestock-price method'." T.D. 5423, 1945 Cum.Bull. 70.

Obviously, the taxpayers in the *Wardlaw* case cannot be bound by an election they did not make. As stated in Merten's, supra, "where there is no freedom of choice and the election is by compulsion, the rule is inapplicable."

It would thus appear that, possibly as a consequence of two dissimilar cases having been joined for purposes of review, the Court has inadvertently decided the *Wardlaw* case on the basis of the facts in the *Catto* case, overlooking the critical difference that *the taxpayers in the Catto case had a true election under Reg.1.471-6(f), whereas the taxpayers in the Wardlaw case had no election at all.*

Under these circumstances, it would seem that justice requires further consideration of the *Wardlaw* case by this Court.

CONCLUSION

By reason of the foregoing, the petition for rehearing should be granted.

Respectfully submitted:

CLAIBORNE B. GREGORY

ELWOOD CLUCK

Attorneys for W. H. Wardlaw, et al, Respondents

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for purposes of delay.

CLAIBORNE B. GREGORY